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1978

# Lemar S. Winegar and Legrand Winegar v. Smith Investment Company, A Utah Corporation : Brief of Defendant-Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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LEMAR S. WINEGAR and  
LEGRAND WINEGAR,

Plaintiffs and Appellants,

-vs-

SMITH INVESTMENT COMPANY,  
a Utah corporation,

Defendant and Respondent.

---

BRIEF OF DEFENDANT

(Appeal from a Judgment of the  
Third Judicial District Court  
of Salt Lake County)

Honorable Peter L. ...

---

HARVEY S. SPAFFORD  
310 South Third East  
Salt Lake City, Utah 84111

Attorney for  
Defendant

HARVEY S. SPAFFORD  
WILLIAM L. DIBB  
310 South Third East  
Salt Lake City, Utah 84111

Attorneys for  
Plaintiffs and Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

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LEMAR S. WINEGAR and	:	
LEGRAND WINEGAR,	:	
	:	
Plaintiffs and Appellants,	:	
	:	
-vs-	:	CASE NO. 15504
	:	
SMITH INVESTMENT COMPANY,	:	
a Utah corporation,	:	
	:	
Defendant and Respondent.	:	

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BRIEF OF DEFENDANT-RESPONDENT

(Appeal from a Judgment of the  
Third Judicial District Court  
of Salt Lake County, Utah)

Honorable Peter L. Leary, Judge

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HARRY D. PUGSLEY  
310 South Main Street, Suite 1200  
Salt Lake City, Utah 84101

Attorney for  
Defendant and Respondent

EARL S. SPAFFORD  
BRUCE L. DIBB  
431 South Third East  
Salt Lake City, Utah 84111

Attorneys for  
Plaintiffs and Appellants

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SMITH INVESTMENT COMPANY,	:	
a Utah corporation,	:	
	:	
Defendant and Respondent .	:	

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BRIEF OF DEFENDANT-RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This action arises out of a dispute concerning the interpretation of a lease and the plaintiffs' failure to exercise a lapsed option to renew the lease for an additional term. Plaintiff's Complaint prays for a declaratory judgment interpreting the renewal provisions of the lease, for a reformation of the lease pursuant to such judgment and damages resulting from the alleged failure of the defendant to consent to an assignment of the lease. Defendant's position is that the attempt to exercise the option was not timely made and seeks attorney's fees under the terms of the lease.

DISPOSITION BY THE LOWER COURT

The case was tried without a jury and the trial court

entered a judgment against the plaintiffs on the plaintiffs' Complaint and each of the causes therein. The trial court did, however, enter judgment in conformance with the plaintiffs' Fourth Cause of Action relative to the removal of the improvements and carwash facilities located on the leasehold premises and made an order for reasonable attorney's fees (R. 62) to defendant.

Plaintiffs' motion to amend the findings of fact and conclusions of law was heard and the defendant's motion for an order fixing the amount of attorney's fees was also heard at that time. Plaintiffs' motions were denied, and the defendant's motion for fixing the amount of the attorney's fees was taken under advisement (R. 81). On November 4, 1977 the plaintiffs obtained a stay of the imposition of the court's judgment pending this appeal (R. 85). The matter of fixing the amount of defendant's attorney's fees has never been ruled on by the trial court.

#### RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the judgment of no cause of action on their Complaint, but do not seek reversal of the judgment of the court pertaining to the right of the plaintiffs to remove the improvements and carwash facilities from the leasehold property upon the termination of the lease. Defendant resists the appeal and reserves the fixing of the amount of attorney's fees for the final remittitur of

the case to the trial court.

### STATEMENT OF FACTS

Defendant is the owner of property located at 9200 South 700 East in Sandy, Utah. Plaintiffs are assignees of a lease for a car wash pursuant to an assignment from William and Elithe Doxey executed on August 21, 1972. The original lessess of the property were Virgil and Thelma Fox, who subsequently assigned their interest to the Doxeyes (R. 142-43). A copy of the Lease is found, R. 7 to 10, and the Amendment to Lease, R. 11-12.

Pursuant to paragraphs four and six of the Lease, the original lessees took the leasehold as unimproved property for the purposes of constructing and operating a carwash thereon. At the time that the Foxes assigned the leasehold interest to the Doxeyes, the carwash had already been erected and the Doxeyes acquired the carwash business, improvements and facilities from the Foxes.

On the 9th of January, 1969, the Doxeyes executed with the defendant an Amendment to Lease (R. 11 and 12 and 144). This Amendment to Lease lies at the heart of the dispute now before the Court.

The Amendment was at the request of the Doxeyes, but was originally drafted by Mr. Reed M. Smith (R. 144). However, three changes in the drafted Amendment were made by interlineation in the presence of Mr. Doxey and at his request.



Mr. Smith is, and at all times relevant herein was, the President of Smith Investment Company (R. 247). The amendment to the lease originally set forth an enlarged lease period of eight years. The calculation of the eight-year period was to be from the 15th day of February, 1967. On the 9th of January, 1969, when Mr. Doxey met with Mr. Smith to execute the amendment, several interlineations were made on the amending document whereby the term of eight years was changed to a term of ten years (R. 145), but further down in the language of the paragraph relating to the term of the lease there is a provision relative to the giving of notice of an intention to renew. The eight-year period referred to therein was not changed by interlineation (R. 152). No request was made for changing that period for renewal (R. 250).

The relevant amended provision is quoted below for the convenience of the Court. The word enclosed in brackets is the portion of the agreement which was crossed out by the parties to insert the word "ten."

2. TERM. The term of this lease shall be for a period of ten (eight) years commencing on the 15th day of February, 1967, as hereinafter provided, with a right of renewal for an additional five years upon condition that notice of intention to renew is given by the Lessees to the Lessor at least three months prior to the expiration of said eight-year period, and upon the further condition that the rent for the renewal period shall be \$200.00 per month.

When the plaintiffs took an assignment of the Lease and the Amendment to Lease, they read the documents, including

the provision for the eight-year term on the right of renewal (R. 189). This assignment was taken by plaintiffs from their brother-in-law, Mr. Doxey, and at no time did plaintiffs make inquiry of defendant as to any alleged ambiguity or lack of understanding of the eight-year period for the renewal right.

The lease term as provided by the Amendment to Lease was for ten years, commencing February 15, 1967, and hence would expire February 14, 1977. The right of renewal for an additional five years is "upon condition that notice of intention is given by the Lessees to the Lessor at least three months prior to the expiration of said eight-year period." So the deadline for giving notice was December 14, 1974. Actual notice was not given until August 20, 1976.

The plaintiffs requested a consent to an assignment of the Lease to Mr. Jensen (R. 165, and plaintiffs' Exhibit 8). In response to the request of the plaintiffs, Mr. Smith wrote a letter to the Winegars dated March 22, 1976, offering a conditional consent to the assignment of the lease (plaintiffs' Exhibit 9). The precise language of the letter is as follows:

We will not withhold our consent to an assignment when the repair and maintenance work is completed and providing we receive financial statements and information to qualify the people that you are proposing as our new lessees.

The Winegars undertook some repairs to satisfy its terms, which consisted principally of painting of the

buildings, repair of the asphalt, replacement of shingles on the roof of the building, and repair of the sign advertising the carwash (R. 166), all of which could be considered routine maintenance pursuant to the terms of the lease, but which had been neglected by plaintiffs.

A financial statement of Mr. Ivan Jensen was mailed to the defendant as an enclosure with plaintiffs' Exhibit No. 10. Plaintiffs' Exhibit 10 was mailed on June 10, 1976, by certified mail and was received by the defendant (R. 169). This letter also contained the plaintiffs' notice that all of the repairs and maintenance work required by the conditional consent had been completed.

In contemplation of the purchase of the carwash and an assignment of the lease, Jr. Jensen paid a down payment of \$5,000 to the plaintiffs as a portion of the purchase price (R. 176). The total contract price was \$20,000. Shortly after the time of the listing of the property by Mr. Jensen, the defendant refused to execute a consent to the assignment of the lease, because such included an acknowledgment of the validity of the notice of intention to renew the lease as given by plaintiffs in August of 1976, 20 months after the required date.

#### POINT I

PLAINTIFFS' TWENTY-MONTH DELINQUENCY IN ATTEMPTING TO EXERCISE THE RIGHT OF RENEWAL BLOCKS ANY RECOVERY IN THIS ACTION BY PLAINTIFFS.

## POINT II

THE DECISION OF THE TRIAL COURT IS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE AND FINDINGS OF FACT.

## POINT III

THE PROVISIONS OF THE AMENDMENT TO LEASE SETTING EIGHT YEARS AS THE RENEWAL PERIOD, ARE CLEAR AND NOT PATENTLY AMBIGUOUS.

## POINT IV

PLAINTIFFS TOOK AN ASSIGNMENT OF THE LEASE AND AMENDMENT TO LEASE FROM THEIR BROTHER-IN-LAW AFTER READING THE SAME AND WITHOUT MAKING INQUIRY OF DEFENDANT, THEREBY ACKNOWLEDGING THE UNAMBIGUOUS NATURE OF THE LANGUAGE.

## POINT V.

PLAINTIFFS FAILED TO ESTABLISH GROUNDS FOR REFORMATION OF THE LEASE OR AMENDMENT TO LEASE.

## POINT VI.

THE COURT SHOULD NOT REWRITE THE LEASE AND AMENDMENT TO THE LEASE TO SATISFY PLAINTIFFS AND RELIEVE THEM FROM THEIR FAILURE TO GIVE TIMELY NOTICE OF INTENTION TO RENEW.

## ARGUMENT

### POINT I

PLAINTIFFS' TWENTY-MONTH DELINQUENCY IN ATTEMPTING TO EXERCISE THE RIGHT OF RENEWAL BLOCKS ANY RECOVERY IN THIS ACTION BY PLAINTIFFS.

### POINT II

THE DECISION OF THE TRIAL COURT IS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE AND FINDINGS OF FACT.

The evidence is without dispute that plaintiffs made no attempt to exercise the five-year renewal right set forth in the Amendment to Lease, until August 20, 1976. This date is over eighteen months beyond the deadline of February 15, 1975 (eight years from February 15, 1967). Thus the failure to exercise the right to renew within the eight-year period granted by the Amendment wholly eliminated that conditional option for renewal.

This Court has consistently held that where a time is fixed for exercise of an option to renew a lease on realty or to purchase realty, that time stated is binding. Unless the notice of intent to exercise such option is timely given, the option right expires and is lost. The most recent of these decisions is J.R. Stone Company v. Keate (March 3, 1978). This was a lease with an option to purchase. Here the attempted exercise of the option was upon terms different from the option right. The decision in part says:

The law requires that one who desires to exercise an option must do so in accordance with its terms; and where there is a substantial variance between the terms of the option and the offer to exercise it, the latter amounts only to a counter offer, which the optionor is at liberty to accept or to reject. From what has been said above it is plainly apparent that the trial court was justified in its finding that the plaintiff was ready and willing to deliver the proper conveyance upon performance of the conditions of the option by the defendant Keate, but that the latter did not make a valid exercise of the option.

In Coombs v. Ouzounian, 24 Utah 2d 39, 465 P. 2d 356,

relief was sought by way of specific performance on an option for sale and purchase of realty. The time period set was June 9, 1966 to January 31, 1967, which was extended to July 30, 1967. No tender of payment was made until October 2, 1967. Relief was denied and this Court affirmed and said:

If an option contract provides for payment of all or a portion of the purchase price in order to exercise the option, the optionee, to be entitled to a conveyance, must not only accept the offer but pay or tender the agreed amount within the prescribed time.

Aiken v. Less Taylor Motor Co., 110 Utah 265, 171 P. 2d 676, directly considered an option to renew a lease. The lease period was October 1, 1941 to September 30, 1943, with a four-year renewal of lease option. This recited, "Lessee hereby agrees to give Lessor 60 day notice before expiration of Lease, if not renewed . . ."

It is elementary that an option to renew contained in a lease must be exercised to effect the renewal. Usually affirmative acts are required either by the express terms of the lease or by implication of law to exercise the option to renew.

We opine the parties intended that if no notice were given 60 days before the end of the two year period, the option to renew was thereby exercised and the lease was thus renewed.

In this exceptional case, failure to do anything during the 60 day period constituted exercise of the option due to the unique language. But the time period was controlling. As stated by the Court, it is elementary that "an option to renew contained in a lease must be exercised to effect

the renewal."

As in most cases and in the Amendment to Lease now before the Court, affirmative action within a stated time limit must be taken, otherwise the option to renew lapses. This rule was earlier defined by this Court in I.X.L. Furniture v. Berets, 32 Utah 454, 91 P. 279, where, in a lease for two years ending December 1, 1906, Lessee overlooked the requirement for exercising the right to renew "at the expiration of the term", but made a request on December 3, 1906, three days late. Relief was sought on the grounds of inadvertence and the equitable rule seeking to prevent forfeitures. The trial court denied the requested extension and the Supreme Court affirmed. On the plea for equitable relief the Court said:

Finally, it is claimed that the contract should be construed and applied most strongly against respondents under the equity rule, which seeks to prevent forfeitures, and that the acts of appellant in seeking a renewal should be favorably considered in its behalf for the same reason. But the rule contended for has no application to the facts in this case. No forfeiture is involved. Appellant, at most, lost nothing but an opportunity by not performing a condition required of it, which was necessary to the enjoyment of a right to an additional term, and which was to be paid for when obtained. If a man is invited to attend a sale of his neighbor's property at a certain time, and is given the right of bidding for and purchasing it, and fails to attend the sale at the hour fixed, he may miss an opportunity, but he forfeits nothing. So here, appellant simply lost the right to a renewal of a new term. He forfeited nothing in the legal sense that that term is used to respondents.

In the present case before the court, the plaintiffs either did not read or misread the figure provision as to the time for the exercise of the option to renew. At no time did they mention a desire to renew and extend the lease or formally seek to exercise such right, until nearly two years after the end of the eight-year term for exercise of the option. The court in its Findings of Fact and Conclusions of Law (R. 59-62, paragraph 6) specifically found "Plaintiffs did not give notice to the defendant of an intention to renew the lease three months prior to the expiration of said eight-year period from February 15, 1967, and plaintiffs were advised by defendant that their right to renew had expired." Then in paragraph 7 of the Findings the court found: "Defendant has done nothing to estop itself from realizing upon and enforcing the terms of the lease and said amendment."

In consequence of said Findings, the court then entered its Judgment that the lease terminated on February 14, 1977 and it is entitled to immediate possession of the premises. Said Findings and Judgment are supported by clear and competent evidence. At no time did the defendant manifest any intent to change the option period beyond the eight years stated in the amendment to the lease, nor did defendant or its officers at any time represent otherwise to plaintiffs or to their predecessors in ownership of the said lease.

### POINT III

#### THE PROVISIONS OF THE AMENDMENT TO LEASE



SETTING EIGHT YEARS AS THE RENEWAL PERIOD,  
ARE CLEAR AND NOT PATENTLY AMBIGUOUS.

POINT IV.

PLAINTIFFS TOOK AN ASSIGNMENT OF THE LEASE  
AND AMENDMENT TO LEASE FROM THEIR BROTHER-  
IN LAW AFTER READING THE SAME AND WITHOUT  
MAKING INQUIRY OF DEFENDANT, HEREBY  
ACKNOWLEDGING THE UNAMBIGUOUS NATURE OF  
THE LANGUAGE.

For the plaintiffs to succeed in the law suit and the appeal before this court, they must somehow convince the court that the amendment to the lease is patently ambiguous, or that the same should be reformed to comply with plaintiffs' present asserted basis that a ten-year option to renew was intended. We will deal first in this section of the brief with the issue of whether or not the lease was patently ambiguous, so as to afford to the plaintiffs a basis for placing oral evidence in the record to show an intent other than that set forth in the document; or, assuming that the evidence was permissible, that the plaintiffs did prove that there was a mutual mistake or some such other basis upon which the court could predicate a change of the lease. The language of the Amendment to Lease is before the court, and particularly it is Exhibit B attached to the plaintiffs' Complaint (R. 11-1). Mr. and Mrs. Doxey at that time were taking an assignment of the earlier lease of November 30, 1966 between defendant and Virgil C. and Thelma J. Fox. The car wash had been erected upon defendant's property and was in operation and the Doxey

desired that the original lease, which was from February 15, 1967 for a term of five years, be made a ten-year lease.

The testimony is clear that at that time the defendant, through its President, Mr. Reed M. Smith, was requested to prepare an amendment to the lease so as to allow such an extension of the term. This he did, and the amendment to the lease as drafted and presented for Mr. Doxey's signature provided for a term of eight years, commencing on the 15th day of February, 1967. When they met for the signing of this document (1969) they requested that it be for a full ten years because two years had already passed. Mr. Smith agreed to this, and there and then, in the presence of each other and at the request of Mr. Doxey, the words "eight years" in the second line was changed by crossing out "eight" and writing over it "ten". Then in the next paragraph relating to rental the word "eight" was crossed out and the word "ten" inserted, and further down, where it referred to the sixth, seventh and eighth years, there was added ninth and tenth. Thus the term of the lease by the amendment was extended for ten years from February 15, 1967.

The original lease had contained a five-year right of renewal, and thus in the amendment to lease a right of renewal was stated as follows: "With a right of renewal for an additional five years upon condition that notice of intention to renew is given by lessees to the lessor at least three

months prior to the expiration of said eight-year period." Plaintiffs contend that by using the language "said eight-year period" the document is ambiguous and unintelligible. The trial court found squarely against such contention. It is to be observed by looking at the document that no question should exist, but that "said eight-year period" clearly and unmistakably meant the term of eight years from the 15th day of February, 1967. It is true that the "eight" in said paragraph above the phrase just quoted above, had been lined out by a single line and a "ten" written above it and initialed by Mr. Smith and Mr. Doxey, but such was and is clearly legible and unmistakable. The mere fact that the term of the lease was extended to 10 years did not pro tanto mean that the parties had to agree to a ten-year period for the option to renew. The allowing of the word "said" to precede the eight-year period in the phrase relating to the right of renewal is not in any way fatal to the language of the Amendment to Lease nor creates an ambiguity therein. Said "eight-year period" is clear and unambiguous, and certainly is not the source of any patent ambiguity such as is asserted and claimed by the plaintiffs-appellants in this case.

For the appellants to succeed in this matter, they must show that it was the intent of both parties to the proceeding that the renewal period should be three months prior to the end of ten years instead of eight years, as stated in the

amendment. Assuming for the purpose of this brief that the court appropriately allowed oral testimony to be admitted relative to the intents of the parties, let us look at the testimony that is in the record relating to the same. Mr. Doxey (R. 148-149), after the court sustained our objection to an expression of his "understanding" regarding the renewal clause, attempted to testify as to what the conversations were at that time. He stated that "It's impossible to remember the exact words that were said in the conversation. So all I can tell you is there is no question about the fact that the lease was extended and included in that extension was the fact that renewal would be extended as well. I can't tell you the exact words that were said, but that's the intent of the conversation." We moved that it be stricken as merely conclusion. The court then asked him directly what was his best recollection and he stated that "To the best of my recollection, your Honor, the lease was extended from eight to ten years, and the Notice of Renewal was also extended." Wherever Mr. Smith was asked about these same matters (R. 255) he testified "When I presented the amendment to Mr. Doxey he said that he understood it was ten years. And I said, 'Well, two years have expired. There's eight years. Eight and two are ten.' He said, 'No, I would need an additional -- I would need the term to be ten years.' And we made the changes at ten years." Then counsel attempted

to somehow impeach that testimony by saying that Mr. Doxey and Mr. Smith were on "extremely friendly terms at the time" which was denied by Mr. Smith, who stated that he had just met the man, had never had any prior dealings with him, and that this was not a casual thing but an actual statement, and the only changes made were initialed by him and by Mr. Doxey.

The record is clear that Mr. Doxey, the brother-in-law of the plaintiffs-appellants, was an educator, a teacher and administrator and had served as a principal in the Granite School District (R. 149-150). He, as well as the plaintiffs, testified that they had read the Lease and the Amendment to the Lease and had had no questions about it directed to the defendant at any time, and Mr. Doxey had the lease in his possession from the date in 1969 until his assignment and sale to his brothers-in-law (plaintiffs-appellants) in 1972, and the plaintiffs-appellants had the lease from 1972 until the time of its expiration in February of 1977.

The court has dealt with an ambiguity and change in the language of a written contract a number of times. One of the more recent decisions is Commercial Building Corporation v. Blair, \_\_\_\_\_ Utah, \_\_\_\_\_, \_\_\_\_\_ P. 2d \_\_\_\_\_, regarding a lease and the interpretations of the same as relating to a parking lot area. There your courts said,

The rule in the State of Utah, as elsewhere,  
is that parol evidence may be admitted to show the

intent of the parties of the language of a written contract is vague and uncertain. On the other hand, such evidence cannot be permitted to vary or contradict the plain language of a contract. There is nothing vague or uncertain in the lease about whether Lots 25 through 30 are committed to parking."

Plaintiffs-appellants in their brief seem to attempt to boost their position on ambiguity by claiming that it is a patent ambiguity, and quote the case of University Club v. Invesco Holding Corp., 29 Utah 2nd 1, 504 P. 2d 29, and apparently relying upon some theory that if the parties are in sharp disagreement as to the meaning of the contract, that it must be a patent case where the rule is that if there is any uncertainty or ambiguity in the terms of the contract, the court may allow extraneous evidence in order to determine what was the true intent of the parties. The problem the plaintiffs have with this is that they must first show that there was a real ambiguity, not merely that the parties at a later date disagreed upon the terms and conditions of the contract. Such subsequent disagreement, wherein the plaintiffs in this case are trying to say that eight years means ten years, is not the basis for the creation of a patent ambiguity requiring the court to act. Even if this were the case, this court would have to find that the trial judge who saw the witnesses and heard their testimony and observed the demeanor of parties, was completely mistaken in his ruling that the lease where it said eight years, meant eight years and did not mean ten years, as to the right of renewal

term. In Bullfrog Marina, Inc. v. Lentz, 28 Utah 2d 261, 501 P. 2d 266, the court allowed the introduction of parol evidence to show circumstances under which the agreement was made and the purpose for which the instrument was executed. And in dealing with this, the court quoted from Bullough v. Sims, saying;

. . . that when parties place their own construction on their agreement and so perform, the court may consider this as persuasive evidence of what their true intention was. It is true that the doctrine of practical construction may be applied only when the contract is ambiguous; but the question become ambiguous to whom? Where the parties have demonstrated by their actions and performance that to them the contract meant something quite different, the meaning and intent of the parties should be enforced.

Let us look at the circumstances before us at the present time in this case, At no time did the defendant, Smith Investment Company, or its President, Reed M. Smith, say, or imply anything inconsistent with the continuous position that the right of renewal was limited to the eight-year period, from February, 1967. When an attempt was made more than a year after the expiration of said eight-year period by the plaintiffs to exercise a renewal right, they were clearly told that the time had passed. There was no practical construction by the defendant that would create either an estoppel or a basis of ambiguity at any time whatsoever.

Had the initial words "eight years" that were in the Amendment to Lease as its term never been written, then the phrase on the period of time for the exercise of the right

of renewal "said eight-year period", might possibly be construed as being ambiguous. However, the document itself, even after the single line through the "eight" and the changing to "ten" on the terms of the lease, is clearly legible and there can be no confusion or doubt as to what this meant by the said eight-year period tagging the length of time for the exercise of the right of renewal. It is to be recalled that the testimony of Mr. Doxey was that he said that he needed a "term to be ten years", but at no time asked for a change in the eight-year renewal notification period on the amendment to lease as written and presented to him. Mr. Smith testified that he was reluctant in making the change to the ten-year term, but that he did do it at the request of Mr. Doxey (R. 256). Plaintiffs would have the court think that there is something magic in having the period for the renewal coextensive with the term of the lease. That was not the contract of the parties; those were not the terms they agreed upon and that is not the language of the Amendment to Lease upon which plaintiffs base their claim to a renewal and extension of the lease. As Mr. Smith testified, there are a number of other tenants in the shopping area, and reasonable management of the same dictated that he should know well in advance whether this lease was going to be extended or not. We submit that there is no patent ambiguity in the document and that there is no occasion for oral testimony or other evidence being admitted or considered competent to



interpret the document itself.

POINT V.

PLAINTIFFS FAILED TO ESTABLISH A BASIS FOR REFORMATION OF THE LEASE OR AMENDMENT TO LEASE.

POINT VI.

THE COURT SHOULD NOT REWRITE THE LEASE AND AMENDMENT TO THE LEASE TO SATISFY PLAINTIFFS AND RELIEVE THEM FROM THEIR FAILURE TO GIVE TIMELY NOTICE OF INTENTION TO RENEW.

Apparently in desperation, and realizing that there truly was no ambiguity in the phrase giving an eight-year period for the exercise of the right of renewal of the lease, plaintiffs seek to have the court reform the lease to conform with their wishes for a ten-year period for the exercise of the right of renewal. No fraud, no "mutual" mistake of fact has been shown, and the trial court did not deem it appropriate to attempt to reform and rewrite the contract for the parties. The basic reason for reformation of these leases and like documents is mutual mistake of fact. This court on a number of instances said that the level of proof essential to establish a predicate upon which the court can make a reformation of the written document is "clear and convincing proof." See Naisbett v. Hodges, 6 Utah 2d 116, 307 P. 2d 620; and Janke v. Beckstead, 2 Utah 2d 247, 332 P. 2d 933.

No assertion is made that there was any misrepresentation.

on the part of the defendant or its President, Mr. Smith, nor any fraud, and as stated by this court in Jensen v. Manilla Corporation of the Church of Jesus Christ of Latter-day Saints, \_\_\_\_\_ Utah 2d, \_\_\_\_\_, \_\_\_\_\_ P. 2d, \_\_\_\_\_, though parol evidence is permissible in an action for reformation to show the writing did not conform to the intent of the parties, when there is no evidence of any fraud or misrepresentation on the part of the defendant nor any finding of such as a basis for granting relief, no such relief will be given.

We do not rewrite the contract, we merely allow the writing to be made to conform to the contract as made.

This court is not engaged in the rewriting of contract to suit one party, particularly where that one party has had an opportunity for many years to exercise a right of renewal and has been so dilatory as to allow the time to pass and then, without just cause or any other valid legal basis, attempts to resurrect the lost right of renewal, no rule in law or equity justified intervention of this court in the redrafting of the contract to suit the plaintiffs-appellants such as in this case.

Plaintiff, Mr. Lamar "Buzz" Winegar, testified that he inspected the Lease and Amendment to Lease when he bought out his brother-in-law, Doxey, in 1962. He testified further (R. 189):

Q. Did you procure any written opinion from any attorney as to this eight-year provision on the right of renewal?

A. Not a written opinion.

Q. You did read the eight-year term in the document on this renewal; did you not?

A. Yes.

Q. And you have known of this ever since the time you first negotiated the contract with your brother-in-law?

A. Yes.

This and other competent evidence in the record negates completely plaintiffs' claims to ambiguity and claims for reformation on the basis of mutual mistake. This and other competent evidence sustains the Findings of Fact and the Judgment of the trial court.

#### DAMAGES

The plaintiffs, in addition to asking for reformation of the Lease and the Amendment to Lease, are seeking damages for the failure of defendant to give consent to assignment of the lease to a prospective buyer. A review of dates will aid the court in placing in perspective the situation of the parties:

Nov. 30, 1966 - date of Lease  
Feb. 15, 1967 - start of lease term  
Jan. 9, 1969 - Amendment to Lease  
Aug. 23, 1972 - Assignment by Doxey to plaintiffs

Nov. 15, 1974 - Last day for exercise of renewal  
(3 months prior to end of eight years)  
Aug. 20, 1976 - Notice of intent to renew mailed  
Feb. 20, 1977 - end of lease term

Within the permitted option renewal period and on June 4, 1976, Exhibit 2-P was written by plaintiffs to defendant. This letter inquired about even another 5 years. This reads, "If we exercise the renewal option . . ." (underscoring ours). Mr. Winegar acknowledged that said exhibit was not an exercise of the option, but merely negotiation to see if yet another five-year option could be added. It seems significant that plaintiffs, within the designated eight-year period, started to consider whether they should seek an extension of the lease. The record does not show whether they then forgot about it for two years, or merely had a change of mind.

It was in March of 1976 when plaintiffs notified defendant of a contract to sell the car wash and asked for consent to assignment. Apparently plaintiffs had not disclosed to their prospective purchaser that plaintiffs had not exercised the already expired right of renewal within the stated time, and that the lease would expire on February 15, 1977. This non-disclosure was not known to defendant. So Mr. Smith wrote that defendant would not withhold consent if the repair and maintenance work, which should have been done earlier by plaintiffs, were completed and the necessary financial statements be assignee were supplied. At no time did the prospective purchaser-assignee contact defendant concerning

the lease provisions. The terms of the prospective sale by plaintiffs were never revealed to defendant (R. 171).

When Mr. Smith saw a real estate listing card which referred to "gross sales of the car wash for the first quarter 1976, amounting to nearly five thousand dollars", he wrote to plaintiffs questioning such representations, as such did not conform with plaintiffs' lesser income reports to defendant (R. 172). Later, "Buzz" Winegar, one of the defendants, testified that when he talked to other prospective purchasers of the car wash "and when they learned of the terms of our lease they were no longer interested."

Plaintiffs did not deal directly with defendant, but used a realtor, a Mr. Densley, who was not called by plaintiffs to testify. The prospective buyer, Mr. Jensen, was called and testified. To reflect his uncertainty about the renewal, he said (R. 223) he became aware of the problem and though it was not in the Uniform Real Estate Contract prepared by plaintiffs,

A. Yes, this is the Uniform Real Estate Contract which we signed at the time that we gave Mr. Winegar the balance of the \$5,000.00 down and agreed to purchase it from him. There was one stipulation. I don't think it's in here, though.

Q. What was that?

A. No, it's not stated in here. Well, that he

had to furnish me a lease from Mr. Smith for the additional five years from February, which was when the lease was -- as near as I can remember -- come up for renewal.

And if he couldn't furnish me with this additional lease, why, then he would refund all that I had given him.

It was apparent that they both realized that the renewal right had expired and that the plaintiffs "had to furnish me a lease from Mr. Smith for the additional five years from February." Not once did Mr. Jensen contact Mr. Smith or any other officer or representative of defendant (R. 228).

Q. Now, this is in February and March and April that you talked about in this deal; was it not?

A. Right.

Q. Now, you never called Mr. Smith and said to Mr. Smith, "Has this been renewed," did you?

A. No.

Q. In fact you have never met Mr. Smith; have you?

A. Correct.

Damages, for loss of the sale to Mr. Jensen and refund of the \$5,000.00 down payment, resulted because no renewal of the contract had been exercised by plaintiffs, and not because of delay in consent. The trial court turned down

the plaintiffs' demands for damages. Such decision was supported by substantial competent evidence. Even if this court were to direct the trial court to re-write the Amendment to Lease, it is not our understanding that retroactive damages could be awarded.

In January, 1978 this Court again reaffirmed the standards on appeal. This was a lease interpretation case, Minshaw v. Chevron Oil Co., January 30, 1978 -

In analyzing the plaintiff's contentions, it is appropriate to have in mind these basic rules of review on appeal: that we indulge the findings and judgment of the trial court with a presumption of validity and correctness; review the record in the light favorable to them; do not disturb them if they find substantial support in the evidence; and require plaintiff to sustain the burden of showing error.

#### CONCLUSION

WHEREFORE, defendant-appellant urges that this appeal be denied and that the decision of the trial court be affirmed. Appellants have failed to show error on the part of the trial judge. No patent ambiguity exists calling for interpretation of this eight-year period for exercise of the renewal right. No showing of fraud or mutual mistake has appeared in the record to justify or require a reformation of the Amendment to Lease. No damages have been sustained or proven in the circumstances. Plaintiffs, after lapse of the renewal option period, tried to sell the car wash to Mr. Jensen, but agreed to refund the down payment if a new five-

year lease was not procured. The plaintiffs' claim for damages is predicated solely upon failure to consent to assignment and such has not been proven because the requested "consent" really involved a belated request for extension of the lease.

Respectfully submitted this 20<sup>th</sup> day of April, 1978.

WATKISS & CAMPBELL



HARRY D. PUGSLEY

310 South Main Street, #1200  
Salt Lake City, Utah 84101

Attorneys for Defendant-Respondent